

Tilburg University

Understanding the market for justice

Barendrecht, J.M.

Publication date:
2009

Document Version
Early version, also known as pre-print

[Link to publication in Tilburg University Research Portal](#)

Citation for published version (APA):

Barendrecht, J. M. (2009). *Understanding the market for justice*. (TISCO Working Paper Series; Vol. 009/2009). Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems (TISCO). <http://ssrn.com/abstract=1416841>

General rights

Copyright and moral rights for the publications made accessible in the public portal are retained by the authors and/or other copyright owners and it is a condition of accessing publications that users recognise and abide by the legal requirements associated with these rights.

- Users may download and print one copy of any publication from the public portal for the purpose of private study or research.
- You may not further distribute the material or use it for any profit-making activity or commercial gain
- You may freely distribute the URL identifying the publication in the public portal

Take down policy

If you believe that this document breaches copyright please contact us providing details, and we will remove access to the work immediately and investigate your claim.



TISCO WORKING PAPER SERIES ON CIVIL LAW AND CONFLICT RESOLUTION SYSTEMS

Understanding the Market for Justice

Maurits Barendrecht

Tilburg University, Tilburg Institute for Interdisciplinary Studies of Civil Law and Conflict Resolution Systems (TISCO), International Victimology Institute Tilburg (Intervict), Tilburg Law and Economics Centre (Tilec); Hague Institute for the Internationalisation of Law (HiiL)
j.m.barendrecht@uvt.nl

**TISCO Working Paper Series on Civil Law and
Conflict Resolution Systems
No. 006/2009
June 9, 2009, Version: 1.0**

&

Tilburg University Legal Studies Working Paper No. 009/2009

This paper can be downloaded without charge from the
Social Science Research Network Electronic Paper Collection
<http://ssrn.com/abstract=1416841>

Maurits Barendrecht¹

Understanding the Market for Justice

Abstract

If justice is so dearly needed, why does it not emerge spontaneously?

Socio-legal research shows how people shop for justice. They approach friends, advisers, lawyers, mediators, suppliers of legal information, local authorities, community leaders, priests, imams, arbiters, or judges in order to obtain redress in situations of conflict. From the perspective of clients, law is probably not so much a system of procedures in which they face barriers to access, but a variety of options on a market for justice services.

In this paper, five types of justice services are distinguished. Whether these services are affordable for clients and sustainable to supply, depends on the costs of production and on the transaction costs of making them available. Investigating the sources of transaction costs for each of these justice services improves our understanding of the legal system. This perspective explains why ADR has hardly succeeded in attracting clients, lawyer services are unlikely to become a commodity, norms for distributive issues are often lacking, and courts have trouble to orient themselves on the needs of their customers. It also indicates which type of policies governments and civil society can consider if they wish to improve access to justice.

¹ Helpful comments on an earlier version were provided by Martin Gramatikov, Machteld de Hoon, Jan Smits, Jin Ho Verdonchot, Ben Vollaard, and workshop participants at the Hague Institute for Internationalization of the Law (17 april 2008) and Amsterdam Centre for Law and Economics (18 april 2008).

Table of Contents

I. SHOPPING FOR JUSTICE	3
II. THE MARKET FOR JUSTICE	5
A. ACCESS TO JUSTICE	5
B. DEMAND: JUSTICE NEEDS	5
C. FORMAL AND INFORMAL SUPPLY	6
D. ANALYZING THE MARKET FOR JUSTICE	7
III. APPROACH.....	10
A. FIVE DISPUTE RESOLUTION TASKS	10
B. THE PERSPECTIVE OF TRANSACTION COSTS	10
IV. TRANSACTION COSTS ON JUSTICE MARKETS	12
A. SELLING SERVICES TO ENEMIES	12
1. <i>Basic Technology</i>	12
2. <i>Transaction Costs of Meeting</i>	13
3. <i>Consequences: Advice, Patronage and Demand for Checks and Balances</i>	14
B. THE MARKET FOR NEGOTIATION ASSISTANCE	16
1. <i>Basic Technology</i>	16
2. <i>Conflict Management Expertise as Public Good and Experience Good</i>	16
C. SUPPLYING INFORMATION ABOUT FAIR SOLUTIONS	17
1. <i>Basic Technology</i>	17
2. <i>Objective Criteria for Distributive Issues as a Public Good and Experience Good</i>	18
3. <i>Consequences: Business Models for Selling Legal Information</i>	19
D. DELIVERING THE OPTION OF A NEUTRAL DECISION	19
1. <i>Basic Technology</i>	19
2. <i>Buying a Neutral Intervention: A Troublesome Transaction</i>	20
3. <i>Consequences: Access to Neutrals is Unavailable or Unreliable</i>	21
E. MAKING ARRANGEMENTS EXPLICIT AND ENFORCEMENT	22
1. <i>Basic Technology</i>	22
2. <i>Transaction Costs of Services that Stabilize Relationships</i>	22
3. <i>Consequences: Stabilization Difficult to Obtain for People with Limited Resources</i>	23
F. COMPLEMENTARITIES	24
1. <i>Connectedness between Dispute Services</i>	24
2. <i>Integrated Services</i>	24
V. CONCLUSIONS	25

I. Shopping for Justice

In Ndirande, a township near Blantyre, the second city of Malawi, men are dying of aids. Their wives know that they will not only lose their husband, but may also become victim to ‘property grabbing.’ The man’s family takes possession of the house and other valuable assets. The wife is sent away, sometimes back to the village where she was born. Quite common in African countries, this practice has some basis in customary laws. Exclusive inheritance through the male line prevents that land becomes divided in ever smaller portions, not sustainable as a farm. In Ndirande, however, women take action against this injustice. They ask advice from friends, try to convince the local leaders to intervene, look for legal aid, and in one case, a victim in Ndirande even succeeded in bringing the case before a formal court (Vossen and Knapen 2009).

Ndirande's women try what most people do if they need protection in relationships to other people: they shop for justice.² Legal needs surveys (Genn and Beinart 1999; Johnsen 1999; Genn and Paterson 2001; Pleasence, Buck et al. 2004; Coumarelos, Wei et al. 2006; Currie 2007) and anthropological studies give an impression how they walk away from the conflict, talk, give in, and settle, but also ask help from the police, complain with local authorities, go to the press, organize themselves into groups who can put pressure on the powerful, or find their way to the myriads of priests, imams, commissions, councils, and informal courts that mediate disputes and coax parties into solutions.

Once we see justice as a service delivered to people by their peers, the issue of access to justice can be analyzed in similar ways as access to other valuable goods. "Shopping for justice" does not sound too respectful, but it may be an appropriate term, because access is obtained through what economists would call transactions. People address other people and ask them for advice or to exert influence on the other party. Often the suppliers of justice services will expect something in return: a fee, recognition as a leader, or some other favor.

Whether justice services will reach the client, first depends on the costs of production. The hours a friend, a lawyer or a judge invests in assisting the client, are one example of production costs. Legal norms have to be produced as well, because information has to be collected, agreement on the rules has to be reached, and norms have to be written down.

In this paper, we will mainly focus on a second type of costs: transaction costs. As consumers, clients have to search for suitable justice services. Ideally, they would compare the expected costs (price) and effectiveness of interventions. This search process can be costly, because information about prices and the quality of justice services is hard to obtain. Once lawyers are hired, clients have to monitor them, so that they do what they promised. Even friends or judges will not automatically serve their clients well. Transaction costs are costs of making justice services work.

Access to justice is often insufficient. In our terms, this means that no adequate justice services are available. If justice services are not affordable for clients or not sustainable to deliver for suppliers, the production costs may be too high in relation to the value added by the service, or the costs of concluding an adequate transaction may be prohibitive. In this paper, we assume that justice goods are not particularly costly to produce (although we acknowledge that there are some notable exceptions). We focus on the mechanisms by which justice services are delivered and investigate where transaction costs are located. We thus look for explanations why markets do not succeed to deliver justice to those who need it.

That markets are not capable of delivering adequate justice will be unsurprising for most readers. They know justice is a matter for states. But what exactly is the source of these problems? This has hardly been investigated yet. Understanding the sources of transaction costs may help us to understand why some people have difficulties in obtaining access to justice. It may also point the way towards interventions that increase access to justice.

Section II links the approach of this paper to the existing literature on access to justice and justice markets. In Section III, the approach is explained more in detail. Five types of justice services are distinguished, that each have their own characteristics. These services help disputants to (1) meet in order to seek a cooperative solution, (2) communicate and negotiate, (3) distribute gains and losses fairly, (4) decide on outcomes, and (5) stabilize their relationships. Then follows a brief introduction in transaction cost theory. Section IV investigates the sources of transaction costs associated with the

² Rev. Alan Sharpton organized marches in shopping districts in order to protest against injustice under this name. We use shopping for justice as a description of the transactions that plaintiffs have to conclude if they want to obtain fair solutions for their conflicts.

five types of services, as well as additional costs caused by the fact that these five dispute services have to work in concert. Section V concludes and takes a quick look at policy implications.

II. The Market for Justice

A. Access to Justice

Whether people can actually obtain a fair and just solution for their conflicts, is known as the problem of access to justice. Access to justice is mostly studied from the point of view of the sociologist: descriptive and without a shared theoretical perspective. Implied in the term access to justice is a perspective of justice as a state of affairs – an organization with lawyers, courts and legislation – to which citizens have access. Many studies describe how people lack access, because they face “barriers to justice.” These studies suggest reforms that may increase access to justice. The literature distinguishes five waves of access to justice reforms: supplying legal aid, public interest litigation, alternative dispute resolution, opening up the market for legal services, and better regulation of the legal profession (Cappeletti and Garth 1978; Parker 1999).

As yet, there is no overarching theory integrating these approaches, nor a clear link to the related topics of civil procedure reform (Tyler 1997; Zuckerman, Chiarloni et al. 1999; Bone 2008; Klement and Neeman 2009) and tort reform (Currie and MacLeod 2008). The practical impact of access to justice reform efforts seems to be limited (Rhode 2004). Alternative dispute resolution, for instance, is much hyped, but little used, and it hardly helps to cut the costs of litigation (Hensler 2002; Wissler 2004). Deregulation of the legal profession does not go much further than allowing lawyers to advertise their services or to work together in multidisciplinary practices.

Recently, the attention has shifted to bottom up perspectives, particularly in the context of law and development. What can people do themselves to solve their legal problems? How can they be empowered to cope with disputes in their own environment? What do they need from the state? Mediation, with its methods to facilitate negotiation and problem solving between the parties, is one trigger for this. Another one is the growing consensus that top down legal reform, where laws and courts are implemented from above, is not very effective in establishing the rule of law. Most analysts of law and development therefore have started to look at bottom up processes for making the legal system more accessible (Jensen 2002; Carothers 2006). Departing from legal needs and empowering people to serve their own needs are the mantras of today (Golub 2003; Commission on Legal Empowerment of the Poor 2008). These bottom up approaches are by their nature more market-oriented, so they invite a more thorough analysis of the economy of processes for accessing the legal system (including informal justice systems).

The search for lower cost and bottom-up solutions to the problem of access to justice is a venture we referred to as microjustice. This term was created because the mechanisms for delivering justice in an affordable and sustainable manner are likely to resemble the ways in which microcredit, microinsurance, and other microservices can be delivered to the poor (Barendrecht and Van Nispen 2008). Developing microjustice requires focusing on the most urgent justice needs (Barendrecht, Kamminga et al. 2008), the five essential tasks of a dispute system (Barendrecht 2008), the most effective ways to serve those needs through developing adequate justice services (usually by producing dispute resolution services locally (Barendrecht 2009)), and lowering the transaction costs of delivering these services (this paper).

B. Demand: Justice Needs

At the demand side, people are most active in trying to get access to justice in situations of conflict. Research suggests three types of relationships in which they are looking for dispute resolution services (Barendrecht 2008; Barendrecht, Kamminga et al. 2008). Personal security presents the most urgent category of problems. Threats may come from outside the community where a person

lives: robbing, looting, maybe even supported by factions in governments. In these situations, people seek basic protection of their human rights. Such protection against violence, unlawful taking of property, and unlawful detention is needed in relationships with outsiders and with the state.

The second type evolves from long term relationships with substantial specific investments, such as family, work, land use, neighbor, and business relationships. Institutional economists have identified the reasons behind this need for protection. In these relationships, parties have to cope with changes in circumstances, preferences, and abilities, which they cannot predict, so their contracts are incomplete. Adaptation to change through negotiation is a necessity, but this takes place in a situation of bilateral monopoly. The parties are dependent on each other, because they invested in the relationship, and cannot walk away from it without leaving these investments behind. Here, some type of dispute resolution is part of the governance structure needed to adapt to these changes, hence the term trilateral governance (Williamson 1987; Nooteboom 1992; Barendrecht 2008; Robson and Skaperdas 2008). Disputes in this category have private law as their basis, with doctrines such as unforeseen circumstances, mistake and impossibility to perform (Chakravarty, MacLeod et al. 2008). Examples of disputes that arise in this context are property conflicts within a community, inheritance issues, problems between landlord and tenant, divorce, neighbor conflict and termination of a long term cooperation in work or business.

A third category of conflicts emerges from arms length relationships between buyers and sellers, or from obligations of the bureaucracy to its citizens. Here, the dispute resolution process typically begins as a complaint about conduct that falls short of what the plaintiff may expect. Legal dispute resolution in this area is largely a matter of investigating what the plaintiff could expect (interpretation of contracts and regulation), how the defendant contributed to these expectations by giving or withholding information (duties to inform, which can come from different legal sources), and whether the defendant delivered goods or behavior that live up to the legitimate expectations of the plaintiff. The way the defendant reacted to the initial problem and the ensuing communication is another point of attention. Fact-finding regarding quality of goods and finding proof regarding the actual behavior of the defendant may be necessary here as well. The dispute processes regarding these issues may fit in legal categories such as civil procedure, criminal procedure, or administrative procedure.

Demand for justice services is not always related to an actual conflict. In order to prevent conflict, and to make relationships work, people may find it useful to make explicit what they can expect from each other in the future. They thus agree on rules of conduct and write contracts. They may also delineate property rights, for instance by registering them. Because these 'stabilization-services' are also needed after a conflict is resolved, we will consider them part of the services that are needed in settings of conflict (see Section IVE).

C. Formal and Informal Supply

Exploration of the supply side suggests that justice services do not always meet this demand. Lawyers have a reputation of being costly; courts of being slow and at times unpredictable. For most relationships and disputes between individuals, or with small businesses as the clients, the formal legal system is expensive to use in comparison to the value at stake (see the World Bank "Doing Business" reports and Zuckerman, Chiarloni et al. 1999). For the majority of people in developing economies, this is true in particular. Access to justice through police, lawyers and courts is outside their reach for protection of property, employment problems, family issues, neighborhood conflict and disputes regarding their businesses. According to the Commission on Legal Empowerment of the Poor, 4 billion people can only hope that some informal way of getting justice is around when a conflict arises (Commission on Legal Empowerment of the Poor 2008).

However, justice services are not only provided by the formal system. They emerge spontaneously in family disputes, where brothers and sisters intervene, and mothers and fathers provide a back up. Rural communities and townships develop their informal justice systems (Wojkowska 2006). Even in

refugee camps, where many tense people live together closely, informal dispute systems arise within weeks. A more realistic picture is thus that people seeking fair solutions look for justice wherever it is on offer. Employees contact people in the company who support them if they have a conflict with their immediate boss. If there is a formal complaint procedure, they may use it. A company mediation scheme, an external commission that hears employee complaints, or a court specializing in labor matters may also be available.

One frequently used avenue is that disputants ask local leaders to intervene. In Bulgaria, for instance, around 30% of the respondents to a legal needs survey told they addressed the local authorities for conflicts with other citizens, although these may have no formal jurisdiction (Gramatikov 2008). In many countries majors of towns hear citizens with complaints about other people, and in developing economies local leaders are often the first avenue for redress (Commission on Legal Empowerment of the Poor 2008). From the perspective of plaintiffs that is understandable: these leaders are accessible at low cost, and their interventions may be quite effective. If they do not intervene in a satisfactory way, the shopping goes on. Even in the Netherlands, a country that scores high on every rule of law index, the police, social workers, trade unions, private dispute resolution commissions and consumer organizations deal with at least as big a share of disputes as lawyers and courts (Van Velthoven and Ter Voert 2004).

To what extent these formal and informal dispute services fulfill the needs of their clients, is unsure, because they are hard to monitor and to assess. But there is abundant evidence that access to justice, either through the formal legal system or through these informal arrangements, is insufficient in many places and in many situations (Parker 1999; Anderson 2003; Rhode 2004; Commission on Legal Empowerment of the Poor 2008). Legal needs surveys show that even in developed countries around 45% of the people reporting a conflict with substantial impact on their lives do not seek access to justice – “lumping it” in the jargon – or stop their attempts. Sometimes the problem goes away, or becomes less important over time, but often the expected costs and trouble of pursuing the matter are too high for them. About 45% of disputes make it into a settlement, but this is not always experienced as a fair outcome (Van Velthoven and Ter Voert 2004). Although bias in perception of fairness is one explanation for this, it is also likely that many people accept an unsatisfactory settlement because the costs of pursuing the matter would be too high. Many people addressing the formal justice system express dissatisfaction: they feel that lawyers and courts do not acknowledge what they find important, experience a loss of control, and complain about unexpected costs (Relis 2002).

If the costs of production of justice would be high, this would explain why many people cannot satisfy their justice needs. However, in most disputes basic negotiation processes and third party interventions can provide reasonably fair solutions at low costs. A skilled mediator or lower court judge will be able to settle most family, employment, and neighbor disputes in a few hours. The technologies of providing justice are not prohibitively expensive (Barendrecht 2009). But there are some exceptions: inducing powerful people to cooperate can be quite costly. Inflicting punishment on perpetrators may have high costs as well (Barendrecht 2009).

Another indication that justice services do not reach the clients by the virtuous operation of the market alone is of course that they are often delivered by the state. Providing legislation and court services are classical tasks of governments.

D. Analyzing the Market for Justice

If justice services are valuable, not inherently costly, but still difficult to deliver, and the state has an active role, this suggests that the market for justice has substantial imperfections. No comprehensive analysis of the market for justice exists as yet. But several strands of literature contribute to our understanding of the ways justice is obtained. This paper builds on these bodies of knowledge.

An intuitive approach would probably distinguish two basic forms of justice services. Plaintiffs either go to advisers: friends, lawyers, or others who assist them to handle the process. Or they go to persons who can influence the other party: village elders, religious authorities, and judges. Lawyers and courts fit these two categories, and indeed the way these services are delivered have been studied to some extent.

The literature on the market for legal services rendered by lawyers tends to frame legal services as similar to other professional services. A transaction cost problem discussed in this context is the asymmetry of information between lawyer and client (Stephen 2006). Another issue derives from the way the customer can judge the value of legal services. Before the service has been provided the client is unable to judge whether what was supplied was appropriate, and even afterwards establishing the added value of the lawyer is problematic. The term credence good has been used to describe this situation. If clients cannot distinguish good legal services from mediocre or bad ones, the better value but high cost services can be driven out by the bad quality and lower cost services. This adverse selection problem, described by Akerlof as the market for lemons in relation to second hand cars, may be addressed by regulating entry to the market by setting quality standards (Akerlof 1970; Stephen 2006). Another problem is that of moral hazard, where the lawyer diagnoses the problem and advises a service that is profitable for him, but not adequate for the client (Stephen 2006). Regulation of the legal profession is usually self-regulation by the bar, so there is the possibility of regulation that is more in favor of the profession than of the consumer. The literature concludes that legal services are regulated too heavily, resulting in limited market entry and innovation, as well as costs that are higher than necessary (Stephen and Love 1999; Hadfield 2000; Baarsma, Felsö et al. 2008). Some analysts see commercial lawyers and other legal professionals as a closed shop, with a common interest to keep the law complex (Hadfield 2000; Hadfield 2008). Others are far more optimistic and believe that a trend towards commoditization of legal services and ever lower prices is inevitable (Susskind 2008).

Access to courts is mainly been studied by researchers with a legal background, but the literature on the efficiency of court services is growing. The incentives on courts have been analyzed theoretically (Posner 1993; Cabrillo and Fitzpatrick 2008). Empirical studies have shown that judges mainly answer to higher courts, which they tend to depend on for their career perspectives (Schneider 2005). Another piece of helpful literature evaluates justice sector reform efforts in third world countries (López de Silanes 2002; Hammergren 2007). This line of research tends to conclude that inadequate incentives and unnecessarily complex procedures are the main causes of underperformance of courts (Botero, La Porta et al. 2003). Increased funding by itself is unlikely to lead to better performance. Incentive-oriented reforms that seek to increase accountability, competition, and choice seem to be the most effective in tackling the problem (López de Silanes 2002; Botero, La Porta et al. 2003). Evaluation and monitoring, as well as opening up the reform efforts and the dispute system itself to non-lawyers, is thought to be necessary as well (López de Silanes 2002; Hammergren 2007). Linking informal dispute systems to formal systems should take place through recognition of the procedures and results of informal systems, with targeted constraints, and if necessary improving them within the formal system (Buscaglia and Stephan 2005; Commission on Legal Empowerment of the Poor 2008).

The usual analysis in terms of two types of services – lawyer-like and court-like – is incomplete, however. It ignores some important properties of justice markets that have to be integrated in the analysis.

First, court services and the services of lawyers are usually rendered to two parties who interact in a conflict. The disputants negotiate in the shadow of a court intervention. An extensive literature on these settlement negotiations exists (Tullock 1980; Pinkley, Neale et al. 1994; Huang 2007; Korobkin and Doherty 2007; Daughety and Reinganum 2008). The resulting trilateral relationship between opponents and a third party complicates justice transactions with courts or other neutrals, as we will

see. In the relationship between the client and his lawyer, the interaction with the other party also makes life more difficult. For the client it is harder to monitor a lawyer than another professional services provider, because the amount of work the lawyer does depends on reactions of the opponent, which may be triggered by the lawyer himself. The literature shows how the parties may become trapped in an arms race, fuelled by the interests of the lawyers, and try to outspend each other in attempts to convince the court to give a decision in their favor (Tullock 1980; Daughety and Reinganum 2008).

Secondly, the interaction between the parties is influenced by rules. Negotiations in disputes take place in the shadow of the law (Mnookin and Kornhauser 1978; Cooter, Marks et al. 1982). Norms and other objective criteria inform the parties about outcomes deemed to be fair, particularly for distributive issues. The supply of these norms to the clients can be seen as a transaction in itself. There is adequate academic literature about the thesis that common law systems are more likely to produce efficient norms than civil law, tending to conclude that both legal traditions will evolve towards a mixed system with courts and legislators as complementing producers of law (Djankov, La Porta et al. 2003; Gennaioli and Shleifer 2007; Ponzetto and Fernandez 2008). The broader question of how norms are produced has been studied less intensively (Posner and Rasmusen 1999), and seldom through the lens of the demand for norms by clients and supply by private parties or government agents (Hadfield 2004; Hadfield and Talley 2006; Barendrecht and Verdonschot 2008). Moreover, the delivery of information about these norms may be a problem in itself, as knowledge about useful norms may be accessible to the legal profession, but not by the clients who need the norms.

Third, the existing literature on markets for legal services tends to ignore the costs of access to justice that are not related to hiring a lawyer. Economists usually assume that property rights and contract enforcement exist and are guaranteed by the state at no cost. Only a few of them have discussed the accessibility of property rights as a problem of supply and demand. Hernando de Soto famously investigated the costs and benefits of property rights registrations in Peru and other developing countries (De Soto 2000). Besides costs of lawyers and court fees, the costs of delay and the emotional costs of a dispute resolution procedure can be substantial. Another important category of costs is the time spent. Collecting information about the facts, documenting this information, travel, waiting, searching for expertise, settlement negotiations, and attending hearings by neutrals can be time consuming affairs (see Gramatikov 2008 for a review of the literature).

Fourth, the usual analysis of legal services tends to consider them as one type of service (Stephen and Love 1999; Stephen 2006; Baarsma, Felsö et al. 2008; Susskind 2008). In this paper we break down services by lawyers, who often lead their clients through several steps in the dispute resolution process, into constituent parts: assistance with negotiation, informing about norms, helping to access courts, and supplying formats for relationships (contracts, property rights). As we will see, these services each have their own characteristics, with different sources of transaction costs.

Finally, and most importantly, we will relax the implied assumption that a formal legal system with courts and laws is present. In a more realistic description of the context for dispute resolution, neutral dispute services can also be delivered by private parties, such as local leaders, arbiters, or mediators. Norms can be developed by legislators and courts, but also emerge as social norms, or be designed by private actors. Enforcement of judgments can take place through agents of the state, but also by providers of enforcement services such as bailiffs, or by the threat of exclusion from a community if a defendant does not comply (Dixit 2004; Greif 2006). Extending the literature on governance institutions (Dixit 2009), we will analyze the specific governance transactions people conclude if they want to be protected and the costs of these transactions.

III. Approach

A. Five Dispute Resolution Tasks

Let us assume a *plaintiff*, who wants to be protected in a relationship to another person, the *defendant*, from which he is dependent. The plaintiff wants a change in the status quo in the direction of a fair and just outcome of the dispute – actually he probably would not mind doing slightly better than fair, but that does not change the analysis in any significant way. The defendant, who is satisfied with the situation as it is, does not immediately give in to the demands of the plaintiff. The defendant may want to change the status quo as well, and in this respect he has to be considered as a plaintiff. Plaintiffs try to communicate and negotiate with the defendant and to influence him. He asks *suppliers* of justice to assist him in these processes.

From the literature on dispute system design (Ury, Brett et al. 1988; Costantino and Sickles Merchant 1996; Shariff 2003; Bingham 2008; Bordone 2008) and from the practice of formal (legal) and informal dispute systems, a model of five distinct disputing tasks can be derived (see table 1). These are the necessary and sufficient elements of a dispute system (Barendrecht 2008). For each of the five elements of a dispute system, there are basic technologies for delivery. Services that support these tasks make use of these basic technologies and can be delivered to the plaintiff.

Task	Description	Basic Technology for Justice services
1. Meet	Centralized forum for information processing	Make costs and benefits of participation for defendant higher than costs and benefits of fighting, appropriation, or avoiding
2. Talk	Communication and negotiation	Support integrative negotiation (interest based)
3. Share	Distributing value fairly	Supply information about fair shares (sharing rules, objective criteria)
4. Decide	Decision making procedure	Make option of a neutral decision available (at low cost)
5. Stabilize	Transparency and compliance	Supply tools to make arrangements explicit; Make costs and benefits of compliance higher than those of non-compliance

Table 2 Necessary and Sufficient Elements of a Dispute System with Basic Technologies for Delivery (Barendrecht 2008).

To start with, the plaintiff and the persons assisting him need to induce the defendant to cooperate. If the defendant can ignore the plaintiff, or fight his way out of the conflict, justice cannot be achieved. Next, the plaintiff and the defendant have to communicate and negotiate, looking for a solution that fits their interests in the best possible ways. Lawyers, mediators, or other helpers with negotiation skills can assist here. Besides trying to create value by finding a win-win solution, the parties usually have to bargain in order to distribute value. Legal rules and social norms can be supplied, thus helping the parties to settle these distributive issues. If they do not agree, a third party helps them to decide: a private adjudicator or a court. They also need settlement contracts, or other means to make the future arrangements explicit. Enforcement is a matter of making it attractive for the other party to live up to the outcome, and here again the plaintiff may be assisted by suppliers of justice services.

These are the types of justice transactions plaintiffs need to close. We will consider transactions concluded with private parties, as well as the transactions that take place with persons or organizations that are part of the government: police, judges, or officials who register property rights and other instruments to make relationships transparent. It is not customary to see the relationship between the client and these persons as a contract, but the client certainly has a direct interest that these persons serve him well. For the client, the problem is again how he can find the right provider of the service, determine the most helpful service, and monitor the performance of these government agents. This is the perspective of transaction costs.

B. The Perspective of Transaction Costs

Transaction costs are the costs of undertaking a transaction. Transaction costs include search and information costs, as well as bargaining costs. Organizations involved in the transaction also make incur costs of setting up and running the organization. In addition, there are the monitoring and

enforcement costs of implementing a transaction (Rao 2003). In the case of delivery of justice, transaction costs are likely to include the costs of searching for the right type of services, the costs of bargaining with lawyers, the costs of addressing courts, as well as the costs of monitoring courts, lawyers, and other suppliers of justice services.

Moreover, transaction costs cover 'the costs of running the economic system.' These include the costs of arrangements that deal with externalities and other types of market failure (Williamson 1981; Rao 2003). The market for dispute resolution services, for instance, may have to cope with information asymmetry, because lawyers know more about the services to be delivered than their clients (Stephen and Love 1999; Baarsma, Felsö et al. 2008). If governments step in to perform certain tasks, they also generate costs, and their activities may influence the abilities of markets to perform these tasks efficiently. Moreover, government organizations, such as courts, have to be run as well, and may struggle to do so efficiently, for reasons that can be brought under the heading of government failure. The bottom line is that each way of organizing transactions, through the market or via governments, has its price (Williamson 1999). Gradually, governance structures will develop that minimize these costs (Dixit 2009).

Five dimensions of transactions are often mentioned that strongly influence transaction costs (Milgrom and Roberts 1992). These are:

1. *The specificity of the investments required.* If a task is performed with the needs of one particular customer in mind, it may be that the investments cannot be made productive for other clients, so the supplier becomes dependent on this particular customer. Thus, a need for protection against early termination or renegotiation of contract terms arises. Legal services indeed tend to be specially made, fitting the circumstances of the individual case.
2. *The frequency of similar transactions and the duration of them.* Repeated interactions, or long term relationships, need less governance, because understandings can develop over time and the parties have incentives to take each others' interests into account because they expect future gains from the relationship. Most clients of dispute services make use of them only once, though.
3. *Uncertainty and complexity.* Both of these elements make it more difficult to be explicit about what should be done to make the transaction happen. Interventions in disputes can be complex, legally, or in terms of conflict management techniques, and the reactions of the other party can cause a considerable amount of uncertainty.
4. *Difficulty of performance measurement.* Milgrom and Roberts describe the difficulties of assessing whether a divorce lawyer has done his job, as the client has little means of ascertain whether the negotiated deal is a good one, or whether another lawyer would have been able to negotiate a better deal (Milgrom and Roberts 1992).
5. *Connectedness to other transactions.* Software designers have to coordinate their efforts with those of the hardware producers on which the software will run, as well as with the suppliers of the operating systems. As we will see, the services of lawyers, mediators, courts and legislators are also connected in many ways.

The transaction costs approach has more or less replaced the better known analysis, which uses the concept of market failure in order to establish where governments should step in. Since ideal markets do not exist, and governments may not be able to remedy market failure in a way that lowers aggregate transaction costs, the existence of market failure is not sufficient to warrant an intervention. Still, common categories of market failure can help to identify sources of transaction costs. Stiglitz, in his handbook of Economics of the Public Sector, mentions six categories of market failure (Stiglitz 2000):

- Occurrence of imperfect competition from monopolies, cartels, or monopolistic competition
- Public goods
- Externalities (including network effects)

- Incomplete markets (innovation, asymmetries of information, enforcement costs, adverse selection, complementary markets)
- Information failures (asymmetric information, insufficient production of information because of its public good character)
- Macro-economic distortions (unemployment, inflation, disequilibrium)

Likewise, he distinguishes four reasons for government failure (Stiglitz 2000):

- Limited information
- Limited control over private market response
- Limited control over bureaucracy (insufficient incentives)
- Limitations imposed by the political process

Transaction cost economics has not yet developed into a hard science. Measuring transaction costs is difficult. Empirical research generally confirms the central tenets of transaction cost economics, like the tendency towards governance structures with lower transaction costs, but it is not conducted on a large scale (David and Han 2004; Macher and Richman 2008). For a particular transaction, it is possible to establish the likely sources of transaction costs, however. The five dimensions of transactions that usually influence the level of transaction costs can be a basis for this assessment.

Until now, the transaction costs perspective has not yet been systematically applied to transactions delivering justice. Husted and Folger have suggested that governance structures are in essence conflict resolution mechanisms, and that considerations regarding the fairness of outcomes, as well as interactional justice, influence the level of transaction costs (Husted and Folger 2004). This fits in the paradigm that third party governance structures are necessary in certain transactions, in particular where relation specific investments are high (Williamson 1981; Dixit 2009). Institutional economists compare governance structures and assume that they tend towards institutions with lower transaction costs, whereas property rights theorists look at the difficulties of delineating property rights in an efficient way (Kim and Mahoney 2005). Although some writers touched on the issue (Libecap 1989; Rapaczynski 1996; Kim and Mahoney 2005; Robson and Skaperdas 2008), the existing literature on transaction cost economics does hardly cover the (second order) problem of transacting with a third party who delivers governance to the two participants in the original transaction. In this paper, we look at these second order transactions that we refer to as justice transactions.

IV. Transaction Costs on Justice Markets

For each of the five justice services, we will now investigate the likely size and sources of transaction costs. These costs depend on the kind of transactions that are needed. So we first go back to the basic technology for delivering each of the dispute resolution services that the plaintiff needs and give examples of suppliers of these services. Then we identify the likely sources of transaction costs, and the way justice markets respond to these costs.

A. Selling Services to Enemies

1. Basic Technology

Coping with conflict cooperatively requires interaction between parties. The defendant has to come to the telephone, the negotiation table, or the court-room. Some form of centralized information processing is necessary (Shariff 2003). So the first thing that the plaintiff needs, is a meeting place where the defendant is present and willing to communicate about the conflict.

The basic technology for letting the parties meet is simple. The costs and benefits of participation to cooperative dispute resolution for both parties have to be higher than those of alternatives ways to cope with the conflict. For the plaintiff, this task requires that he makes it more attractive for the

defendant to meet him, than to ignore the conflict, or to fight him in whatever way and with whatever weapons.

There are many ways to achieve this for the plaintiff, that can be offered as a service to him. For instance, a meeting place can be made attractive for the defendant by being close and safe. If the defendant predicts that the interaction that will take place will lead to creative solutions to the problems of the parties, the expected value of going to the meeting place will be higher for him.

Task	Best Practices for Dispute Services/Transactions	Possible Providers of Services
1. Meet	<ul style="list-style-type: none"> - Local meeting places or other channels of communication - Pre-mediation skills - Social norms to solve conflicts cooperatively - Enhance incentives that link to reputation of defendants to solve conflicts cooperatively - Option of default judgment 	<ul style="list-style-type: none"> - First line legal aid - Friends and advisers - Community leaders - Mediators - Courts

Table 3 Best Practices for Facilitating the Dispute System Task of Meeting and Service Providers (adapted from Barendrecht 2009)

In case both the defendant and the plaintiff want a change in the status quo, both have something to gain from the meeting, and it will be relatively easy to induce them to do so. Inducing the defendant to meet is more problematic if the defendant expects an outcome that will make him worse off. A defendant may fear that he has to pay a substantial amount of money as compensation, or even has to undergo some form of punishment. In such cases, the plaintiff will need more help from others to create a context in which the defendant will still have incentives to participate in a cooperative process. If the defendant cares for his reputation, it may help if the plaintiff can assemble a larger group of people who are important to the defendant. If the defendant has little to lose, the threat of punishment, or even forced cooperation, may be needed. Then the plaintiff needs help from the police, or another service that makes the defendant comply.

2. Transaction Costs of Meeting

Interaction is needed for a fair solution of a conflict, but getting two disputants in one room is hard. Evidence of this transaction cost problem is everywhere around us. A husband and wife are not finding a way to talk about their deteriorating relationship, and eventually about their divorce. Before two companies and their lawyers meet to negotiate, many letters and telephone calls have to be exchanged. Even wars may start without any real attempt at negotiation, mediation, or arbitration (perhaps the best example being World War I, where Nicholas II the Tsar did not even suggest to meet his nephew Kaiser Wilhelm II in The Hague's newly opened Peace Palace, although having an International Court of Justice to prevent war had been the Tsar's idea).

More generally, it is hard to agree about a way to deal with a conflict, even if both parties are likely to gain from cooperative dispute resolution. The technical term for this is an ex post dispute agreements, where the parties already in conflict agree to a specific procedure, or a particular person who will decide on their issues.

Such agreements are rare (Shavell 1995; Barendrecht and De Vries 2006). Where a defendant is offered the option of mediation, rejection rates are high (Moore 2003). Mediation services are widely available all over the world, but the number of mediations actually taking place is very disappointing. In fact, very few registered mediators can make a living from it (Velikonja 2009). On a mediation summit in 2008 organized by the ABA in The Hague, one speaker estimated the size of the market for mediation in the US at \$500 million, which is equal to the turnover of the 50th largest US law firm. Most mediation is court-annexed, and takes place late in the procedure, when most legal costs have already been spent (Stipanowich 2004). Arbitration institutes have similar trouble attracting sufficient clients. Once the employment conflict is there, binding arbitration is hardly ever agreed on. Difficulties of concluding ex post dispute agreements do not only occur if alternative dispute resolution is proposed. Most legal systems allow agreements over the way to conduct a legal procedure. Such

agreements would be very effective tools to diminish legal costs, and to tailor the procedure to the needs of the litigants. But they hardly occur (Barendrecht and De Vries 2006). In actual litigation practice, agreements about the way to conduct court proceedings do not extend beyond very practical arrangements about logistics.

What we basically see here, is a dispute about how a dispute should be dealt with. Continued unresolved conflict, or war, is usually a negative sum game and thus undesirable. Agreeing on a dispute resolution process is generally a Pareto improvement for both parties. However, the way the problem will be tackled is very likely to become an issue for bargaining itself.

This second order negotiation problem seems to be difficult to solve, for reasons similar to the first order problem. The psychological barriers that impede the resolution of a conflict itself, are also likely to show up when the parties talk about the way to solve the conflict (Barendrecht and De Vries 2006). Reactive devaluation occurs when a disputant distrusts an opponent's proposal regarding a suitable dispute resolution procedure (Ross 1995). Over-optimism may cause him to underestimate the impact of the dispute, or the value of his outside options. Loss aversion may cause a defendant to postpone participation in a cooperative procedure if he expects to be required to make concessions (Arrow 1995). At the initial stage of conflict resolution we are talking about, we have to add the effects of negative emotions. Angry, fearful or contemptuous parties are not very likely to make a calm and reasonable decision about the way to resolve a conflict in a cooperative manner (Allred 2005; Van Kleef, De Dreu et al. 2006).

Another important category of market failure is probably the possibility that individuals have strategic reasons for not – yet – wanting to deal with the dispute in a cooperative way. While a plaintiff wants fast results, a defendant is better off in the status quo and does not mind a lengthier procedure. One party may fear extensive neutral fact-finding, while the other party expects to gain from the investigation. In essence, this is a bargaining problem where both parties can gain from concluding a transaction, but have to split the gains from trade. Bargaining theory and empirical research show that the risk of impasse is substantial, because the parties obtain better results if they are patient, make extreme offers, commit themselves to making no further offers, try to hide information from the other party, and make efforts to develop alternative ways to serve their interests (Muthoo 1999; Muthoo 2000; Carraro, Marchiori et al. 2006; Korobkin and Doherty 2007).

As we have seen, there are also situations where cooperative dispute resolution is not in the interest of the defendant, because he is likely to be worse off. Then the plaintiff may have to rely on others to provide additional incentives on the defendant to cooperate. The costs of the transactions necessary to influence the other party can be quite high, if the defendant is a powerful person. Many people may have to team up before a big company changes an unjust policy. In order to confront a dictator, quite some people have to unite and spokesman have to be found, who take the risk of retaliation, as human rights lawyers know. From the perspective of the individual plaintiff, many transactions have to be coordinated with many people who agree to take some form of action. Having to align many connected transactions is a common source of transaction costs.

3. Consequences: Advice, Patronage and Demand for Checks and Balances

The high transaction costs of ex post dispute resolution agreements have important consequences. Clients and justice providers face a difficulty that is uncommon in the economic system. Most goods and services are sold to one buyer, or to a group of persons with similar interests. A mediator, arbiter or judge, on the other hand, has two clients, who are likely not on speaking terms, and with interests that are poorly aligned. Because the two parties cannot easily choose a dispute resolution process together, it is unlikely that they will hire a neutral.

Instead, they turn to services they can buy by themselves. Many people in a dispute seek unilateral advice. They go to a friend or a lawyer. For such a decision, the other party is not needed, so the

transaction costs of buying this service are much lower than the costs of buying dispute services jointly with the other party.

A lawyer certainly offers valuable services: coaching, advising on options and norms, help with negotiation and with addressing a neutral (Mnookin, Susskind et al. 1999; Mnookin, Peppet et al. 2000). But the presence of an agent may also create new transaction cost problems. Depending on how he is paid, he may have a perverse interest to complicate the dispute instead of helping to solve it. Moreover, if one party hires an adviser, the other tends to hire one too, thus diminishing the value of the lawyer for the first party. An arms race may result (Tullock 1980). Finally, there are now four people who need to be willing to meet and talk, so the coordination problem may become even more complicated to solve.

The other common reaction of plaintiffs who want to solve a dispute but cannot find a way to meet the defendant is to address a person who can influence the defendant. Disputes create a market for neutrals that exert power over others. This demand for power is studied under various headings that have a negative connotation to them, such as patronage, clientilism and corruption. The basis is a very common phenomenon, however. People look for parents, bosses, clan leaders and government officials who can help them to get protect their interests in relationships with others (Dixit 2004; Dixit 2009).

Asking the powerful for help can be seen as another transaction. The powerful person offers his interventions. The sources of power that shape these interventions are well known. By inflicting sanctions, by offering rewards and by using expert knowledge the powerful can help people to solve their disputes. If they have legitimacy, or act as an example (referent power), they can use this to influence the defendant (French and Raven 2001). For the powerful person the intervention is costly, and he is likely to ask something in return. He may want to be paid in cash, or get support for his causes. Rewards may also come in the form of being seen as a wise and just person, or from the satisfaction of being able to help people with settling their issues.

Transactions involving the powerful in disputes are rather complicated in nature. The inputs from the sources of power are very context specific and so are the rewards for the powerful person. The efforts of the powerful person are difficult to monitor. Because power can be used in many ways, from benevolent to malicious, and the plaintiff has little control over the person he has asked to intervene, the outcome remains unsure. The demand for interventions by powerful people thus creates an additional demand for restraints on power. Checks and balances on power become needed. Complexity, high specificity and difficult monitoring all point in the direction of high transaction costs.

So the high transaction costs of obtaining justice in the straightforward way of hiring a neutral, lead to extra demand for unilateral advice (lawyers) and to extra demand for interventions by powerful people who can influence others. These transactions in turn lead to very substantial transaction costs. Finally, some plaintiffs are unlikely to succeed in making defendants cooperate. Some defendants have much to loose from solving the disputes in a cooperative way, and some defendants are too powerful. Organizing pressure on these defendants requires extensive coordination between many persons.

Even at this introductory stage, before the actual dispute resolution process begins, justice markets already face difficulties. So it is not surprising that the state has become active in the market for justice in order to stimulate cooperative dispute processes. For criminal acts governments provide prosecution services. In civil disputes, the defendant must appear in court in order to discuss the issues, otherwise he will be sanctioned with a default judgment.

B. The Market for Negotiation Assistance

1. Basic Technology

Once both parties reach a meeting place, the plaintiff needs to communicate and negotiate with the defendant. Through negotiations, they can try to find Pareto-optimal outcomes for the conflict. The basic technology for finding win-win solutions is one of integrative – or problemsolving – negotiations. Here, the following subprocesses are essential (Walton and McKersie 1965; Fisher, Ury et al. 1991; Lewicki, Saunders et al. 2006): First, the parties have to review and adjust relational conditions to create an environment that promotes communication and information-sharing. After reviewing and adjusting perceptions, the process should focus on interests: the needs, wishes and fears of the disputants. The disputants are advised to take a joint problem-solving approach to the dispute, be creative in developing a number of solutions, and choose a (win-win) solution that best fits the interests of both parties.

Task	Best Practices for Dispute Services/Transactions	Possible Providers of Services
2. Talk	<ul style="list-style-type: none">- Negotiation assistance (integrative negotiations)- Communication, active listening, questioning techniques- Reframing and adjusting perceptions- Managing emotions and interaction- Improving relationship, recognition, apology, supply of coping skills- Standard format integrative negotiations (identify interests, issues, explore win-win solutions)	<ul style="list-style-type: none">- Advisers- Lawyers- Mediators (facilitative)- On-line facilities

Table 4 Best Practices for Facilitating the Dispute System Task of Talking and Service Providers (adapted from Barendrecht 2009)

The plaintiff can buy services that bring integrative negotiation to the table via the market. The skills and practices that support these processes are well described, and made accessible for practitioners (Moffitt, Bordone et al. 2005; Deutsch, Coleman et al. 2006; Oetzel and Ting-Toomey 2006). Facilitating problemsolving negotiations can be done by mediators (Wall, Stark et al. 2001; Moore 2003), by cooperative lawyers (Lande 2005; Lande 2008), or by online dispute resolution facilities (Katsh, Katsh et al. 2001; Braun, Brzostowski et al. 2006; Brett, Olekalns et al. 2007). If the parties learn these techniques, they can also apply them without assistance (Fisher, Ury et al. 1991; Ury 1991).

2. Conflict Management Expertise as Public Good and Experience Good

Transactions in which the parties buy these services are relatively easy to close. Assuming the parties have solved the problem of meeting, and have found a way to coordinate their attempts to buy the type of services that can help to solve the dispute, buying conflict management expertise is not very different from buying engineering skills, software expertise, or management advice. The only fundamental problem suppliers of this expertise face, is that they basically sell information. Varian distinguishes three attributes of information goods that make them difficult to bring to the market (Varian 1998; Raban 2007), which also apply to information needed by those seeking access to justice (Commission on Legal Empowerment of the Poor 2008).

Information is often a public good (Stiglitz 1999; Raban 2007). Once it is delivered, the buyer of the information cannot be stopped from using the information for other purposes, or even selling it to others. Because the seller of the information knows this, he has insufficient incentive to produce this information and bring it to the market. Although the value of information about integrative negotiation techniques can be high, it may thus not reach the consumers. Another problem is that people can only tell whether they want to obtain information after they have obtained it. Information is an experience good. Sellers of conflict management information thus have a hard time to convince their buyers to spend money on these goods before they actually get them (Varian 1998). Finally, information products often require a high upfront investment in production costs, whereas the marginal costs of producing and distributing extra copies is close to zero (Varian 1998)

Information sellers have found various ways to cope with these problems, and these are used in the context of dispute resolution services as well. The experience good problem can be overcome by giving people previews of the information, by independent reviewing of the information, or by building reputations for delivering high value information (Varian 1998). Expertise can be sold successfully by packaging it with other services. The professional services literature distinguishes four basic forms of packaging: adding value to information for a specific client, improving client decision-making, enhancing client processes, or improving client skills (Dawson 2005). Professional services firms specializing in engineering, accounting, or medical expertise show how to do this. And legal services have followed.

General dispute resolution knowledge can be customized and individualized in relation to the needs of the client. This product differentiation, or versioning (Shapiro and Varian 1998), diminishes the possibility to reuse or to resell it. A lawyer or another dispute resolution professional can also help the client to solve his individual dispute, improving the client's decision making. The client does not have to apply the information to his own problem. He gets tailor-made advice. A next possibility is to run the process for the client. Just as a management consultant can organize the process to form a corporate strategy for the client, a lawyer or a mediator can organize the negotiations for his client. The lawyer may even take the dispute resolution process out of the hands of the client completely, by bringing his case before the court. A fourth business model for selling information is to improve clients skills. This can be done by packaging large chunks of information together. A book, a course, or a website only accessible for members are examples of this model. Here the individualization is left to the clients, who should read the book, or find out for themselves how to apply the skills and best practices to their particular situation.

Not every client is likely to be served in the same way by these four business models for selling information. Tailor made advice and services that run the process for the client are easily accessible, but expensive because they are usually provided on a one client to one expert basis. If the expert takes the dispute out of the hands of the client, this is likely to be a costly affair as well, and it is not certain that the client's interests are served. Clients who cannot afford individualized services have to rely on general information packaged in books or brought to them in workshops or other forms of education. They have to do the individualization themselves, or hope that the information reaches them in other ways.

So poor people, who cannot afford individualized professional services, and who may lack the skills to individualize useful general information, are less likely to be reached, a hypothesis that has been confirmed by empirical research (Buck, Pleasence et al. 2008). Commoditization, as it takes place in consumer goods markets, where economies of scale bring goods within reach of ever more consumers, has been predicted for legal services (Susskind 2008). But it is unlikely to occur in the market for dispute resolution services. Until sustainable business models are developed that can bring conflict resolution information to poor clients, dispute resolution skills and knowledge are bound to be a luxury good.

C. Supplying Information about Fair Solutions

1. Basic Technology

Disputes always include issues over value that has to be distributed. In case of divorce, assets must be divided and care for children allocated to each of the parents. Personal injury claims have to be settled by some amount of money. In many relationships, there is the problem of how to share the work that must be done and the revenues that come from the relationship.

Settling distributive issues in conflicts is difficult, because the parties are dependent on each other. They can only settle with this one other party (a bilateral monopoly). The bargaining literature shows

that they often get stuck (Muthoo 1999; Muthoo 2000; Carraro, Marchiori et al. 2006; Korobkin and Doherty 2007). The underlying dynamics are that a disputant does better in distributive issues if he has more patience, makes more extreme offers, commits himself more, has more attractive outside and inside options, and has more information. If both parties follow these strategies, negotiations are unlikely to succeed. This is known as bargaining failure. Moreover, this type of conduct is likely to fuel the negative emotions that are already present in a dispute and to increase the cognitive barriers to conflict resolution.

Besides letting a neutral third party decide the issue, to which we turn in the next section, there is one basic technology for helping parties settle distributive issues in a fair way. Market prices, rules of thumb used in practice, social norms, or case law provide people with information about the way others dealt with similar problems (Fisher, Ury et al. 1991; Shell 2006). These “objective criteria” can help parties negotiating in a bilateral monopoly situation assess the fairness of outcomes, which is often difficult for them (Pillutla and Murnighan 2003; Husted and Folger 2004; Cialdini 2007).

These objective criteria do not have to be binding legal norms. Information on how others actually settled distributive issues, or suggestions on how they *might* settle, are probably more effective than information on how they *should* settle (Barendrecht and Verdonchot 2008; Verdonchot 2009). Both types of information contribute to a shadow of the law, a neutral image of a just world, that makes it easier to settle differences (Mnookin and Kornhauser 1978; Cooter, Marks et al. 1982; Hacker 2008; Nisenbaum 2009; Ray 2009).

Some authors have noted that objective criteria have a function in a dispute comparable to information about a market price in a standard economic transaction (Barendrecht and Verdonchot 2008). Knowing what the going rate for the good or service is on the market, helps both parties negotiate the price. Objective criteria give information about this going rate. This ‘pricing information’ is particularly helpful in the setting of disputes, where there is a bilateral monopoly, since the alternative of going to another buyer or seller for the disputed goods is not available (Yeazell 2008).

Task	Best Practices for Dispute Services/Transactions	Possible Providers of Services
3. Share	<ul style="list-style-type: none"> - Bargaining assistance (distributive negotiations) - Objective norms and criteria for most common issues in most common disputes - Make this information widely available in order to increase transparency 	<ul style="list-style-type: none"> - Advisers - Lawyers - Mediators (evaluative) - Legislators - Courts rendering precedents - Legal academics - Legal information providers (publishers)

Table 5 Best Practices for Facilitating the Dispute System Task of Sharing Service Providers (adapted from Barendrecht 2009)

2. Objective Criteria for Distributive Issues as a Public Good and Experience Good

There is likely to be a need for objective criteria and thus there should be a market for producing them. Unfortunately, objective criteria are again a type of information and we have seen that information may have characteristics that makes it difficult to sell.

Producing meaningful information about the going rates of justice is costly. It requires extensive knowledge about the ways disputes of a certain type are settled or decided by neutrals. Outcomes of disputes tend to be individualized, taking many of the circumstances of the case into account. Discovering the patterns in decisions and translating them in useful rules of thumb is necessary. Once the rule is published, however, the marginal costs of letting another person use the information is close to zero, and it is very difficult to exclude people from using the information. Everyone is free to use and copy a norm for his private use. Thus, there is little commercial incentive to produce information about rules regarding suitable ways to deal with distributive issues (Posner and Rasmusen 1999; Parisi 2000).

It is interesting to explore the parallel with information about prices on markets for consumer goods a little further. Price transparency is a condition for efficient markets, but it is not self evident that such information is produced, because it is costly to collect this information and display it. Stock markets, for instance, let buyers and sellers quote their prices, and thus contribute to the transparency of prices. Demonstrating that this information is valuable, stock markets try to protect pricing information through intellectual property rights and through contracts (Mulherin, Netter et al. 1991).

Another reason why the 'going rates' of justice are not published, may be that a person who makes them transparent is likely to be criticized. He may be accused of being biased by interest groups from both sides. Repeat-players, or more generally those with more negotiating power, may also have an interest in keeping such going rates secret so that their opponents are unsure what a reasonable settlement is. Insurance companies, for example, tend not to publish the going rates for settlements in personal injury cases. This may induce some people to fight on, but the majority of plaintiffs are likely to accept a comparatively low settlement.

3. Consequences: Business Models for Selling Legal Information

The scarcity of information about fair ways to settle distributive issues is a problem to which solutions have been found. The market for legal expertise developed in the same way as the one for communication and negotiation know how. Lawyers offer tailor made legal advice about the likely outcome of a dispute. They bundle this legal information with other services, such as helping parties to write a contract or to argue a case in court. People with knowledge about legal norms can also package the information in a book or a course, hoping the package will sell.

Whether the market for legal information satisfies the need for objective criteria has not been researched to date. Some anecdotal evidence suggests that the market does not easily produce the type of information about the going rates of justice that disputants need. The market for legal information is a multi-billion market, but case law digests and handbooks are not accessible for lay people. Moreover, they tend not to give much guidance about the way people usually solve their most common disputes: divorce, termination of employment, conflicts between owners and users of land, water rights, or problems with suppliers of goods and services. Lawyers, judges, and repeat-players like insurance companies may know the going rates for settling such disputes, but they do not seem very eager to publish them.

Some writers suggest that the legal profession has an interest in keeping the legal system complex and non-transparent, as this creates more demand for legal services (Hadfield 2000). There may be truth in this, but it is probably part of the more general truth that expertise is difficult to sell because information is a public good and an experience good. Lawyers, just like doctors, architects or IT giants have an interest to distribute their know how to one client at a time, and in a way that makes it difficult to resell the information.

D. Delivering the Option of a Neutral Decision

1. Basic Technology

The possibility to reach a final decision is an essential element of a dispute system. The basic technology for this is the option to address a neutral decision maker like a court.

The need for a neutral decision may appear self-evident, but it is important to explore the different ways in which a plaintiff profits from this service (Lempert 1978). In Section A, we saw that the threat of a neutral intervention is an incentive for the defendant to meet and talk, particularly for those defendants who feel better off now, than they expect to be after a fair solution to the dispute. Once the communication and negotiation process takes off, the same incentives are needed to let the defendant make moves towards a fair and reasonable solution for the distributive issues. In a way,

the neutral also supervises the negotiations, because both parties know that they can be brought to court to evaluate their points of view. Moreover, someone must make a decision if negotiations continue to fail, particularly if the parties do not reach agreement on the distributive issues ("bargaining failure" see Section C and Barendrecht 2008). "No deal" is a fully acceptable outcome if people are looking for partners to conclude arms length market transactions. But in a dispute, where there is a bilateral monopoly with very unattractive outside options, no deal usually equals injustice.

The costs of access to neutral interventions such as courts (direct monetary costs, as well as time spent, costs of delay, and costs of stress and the like) are essential parameters of a dispute system. Table 6 lists some best practices for creating access to a neutral decision at low costs.

High costs of access to courts are an often cited problem in dispute systems (Commission on Legal Empowerment of the Poor 2008). High litigation costs are not only problematic because they make the service of neutral intervention very expensive, they also dilute the other effects of access to a neutral decision maker (Barendrecht 2008). In order to avoid the negative effects of high litigation costs on the process and the outcome of settlement negotiations, the expected litigation costs should be small compared to the value at stake. An often mentioned criterion is that the sum of decision costs and error costs should be minimized (Tullock 1980; Shavell 2004; Cabrillo and Fitzpatrick 2008). Assuming that the probability of error is not very high, and the costs of error are not more than the value at stake, the litigation costs should be in the range of 10 to 15% of the value at stake, preferably less. Is this the type of neutral interventions that are available on the market for dispute resolution services?

Task	Best Practices for Dispute Services/Transactions	Possible Providers of Services
4. Decide	<ul style="list-style-type: none"> - Adjudication - Simple procedure (oral presentation, hearing, decision) - Limited fact-finding - Judicial/neutral case-management and information processing - Online formats for defining interests, distributive issues, possible solutions, decisions - Stimulate cooperative attitude - Procedural justice: voice, participation, trustworthiness, neutrality, interpersonal respect. - Discussion of possible objective criteria for outcome - Integration of decision making and settlement - Mild time pressure - Preliminary judgments in more difficult cases - More generally: minimize sum of decision costs and error costs 	<ul style="list-style-type: none"> - Persons with informal power - Courts - Arbitrators - Neutral fact-finders - State agencies

Table 6 Best Practices for Facilitating the Dispute System Task of Deciding and Service Providers (adapted from Barendrecht 2009)

2. Buying a Neutral Intervention: A Troublesome Transaction

There are many people who like to help others to solve their disputes, either as volunteers or for profit. Arbitration services are widely available. Experts who can solve distributive issues, such as valuation of property, determination of damages, or the amount of liability, can easily be found on the market. As we saw, the market for patronage provides a very natural recourse for a plaintiff who wants a defendant to make a move. Powerful people make a business of protecting others.

Ideally, both parties contract with the same person who will then provide a neutral decision. But for this, the parties have to agree that this particular neutral is able to decide their dispute in a fair and just way. For the reasons discussed in Section A, this is difficult, and once the neutral is appointed, the same coordination problems subsist. During a dispute resolution procedure, the parties are unlikely to jointly agree on what exactly the neutral must do and on the costs of the services that they will buy from the neutral. Each decision on this influences the process, and the process influences the outcome, so the procedure becomes a strategic issue. The mindset of the disputants, who tend to distrust proposals from the other side, creates additional barriers. So the neutral does not receive

guidance from his clients. His position is comparable to a builder of a home for a couple that disagrees about everything from the color of the tiles in the bathroom, to the number of stories the house should have, and even the budget for the project. The only thing on which they seem to agree, is that he should build a house.

If we go back to the sources of transaction costs discussed in Section IIB, the setting described has many attributes that point into the direction of high transaction costs:

1. Once the parties have addressed a neutral, it is costly to switch to another adjudicator because that would mean that they would have to agree on opting out from the contract with the first neutral. Even if they would succeed in this agreement, the investments in informing the first neutral are partly wasted and they will have to inform the new neutral about their individual case (asset specificity). The parties are thus dependent on the neutral, who is unlikely to be fired.
2. The transaction between two parties and one neutral is typically a one time affair, so there is little discipline by the prospect of future interactions (low frequency).
3. Both parties expect the neutral to reign in the other party and to leave themselves room for manoeuvring, which makes the services of the neutral complex. Unexpected conduct of the other party causes much uncertainty and makes it very difficult to write a precise contract about what can be expected from the neutral (uncertainty and complexity).
4. Because both parties have different needs and expectations, it is difficult to measure and monitor performance of neutrals in dispute resolution processes, especially if there are no objective criteria against which the disputants can assess whether they obtained a fair solution. The difficulties of assessing the work of the neutral and the possibility of future interactions between one of the parties and the neutral create easy opportunities for corruption (difficult monitoring).
5. As we saw, low cost interventions by neutrals are very important as support for negotiations and to letting the parties come to the table in the first place. If there are no courts or other neutrals available, the market for other dispute resolution activities will deteriorate (connectedness with other transactions).

3. Consequences: Access to Neutrals is Unavailable or Unreliable

For the plaintiff, concluding a transaction with a neutral for a procedure in which the defendant participates is thus extremely troublesome. Providers of dispute services have tried to find a solution for this by stimulating the parties to a relationship to choose a way to solve the dispute before they are in a situation of conflict. But this solution – an ex ante dispute resolution agreement – only works if the parties formalize their relationship in a contract (Shavell 1995; Eisenberg and Miller 2006; Sternlight 2007). That is unlikely to take place for many common relationships like marriage, informal employment, or informal tenure of land. For other sources of disputes – crimes by strangers, neighbour issues, or accidents resulting in personal injury – it is almost unthinkable that an agreement is reached before the conflict arises.

So most plaintiffs have to rely on persons that have influence over the other party, but are not bound to any agreement with the plaintiff or the defendant about the way they will use this influence. They do not only have to think about ways the other party will be influenced, but also about strategies for keeping this person in check. The defendant faces a similar problem if the powerful person is intervening. Both parties will have to mobilize others to monitor the neutral and hope that he has sufficient interest in maintaining a reputation for neutral and helpful interventions in conflicts.

This is an area in which the costs of market transactions apparently are so high, that governments have stepped in. They provide neutrals in the form of independent judges. This partly solves the problem of the plaintiff, but it remains to be seen whether this government agent has sufficient incentives to help the parties solve their disputes in a fair and low cost manner. Most commentators

doubt whether the incentives on courts to provide adequate services to clients are sufficient (Messick 1999; Frynas 2001; López de Silanes 2002; Hammergren 2007; Cabrillo and Fitzpatrick 2008) .

E. Making Arrangements Explicit and Enforcement

1. Basic Technology

After the conflict has been resolved, the disputants need to find a new equilibrium. A property conflict, for instance, may be settled by allocating ownership to one of the parties, giving temporary rights of use to the other party, a payment, and/or a share in the proceeds if the property is sold with a profit within two years. These arrangements stabilize the relationship and make transparent what the parties can expect from each other in the future.

Justice services can facilitate this stabilization process by offering ways to make arrangements explicit. Contracts, settlement agreements, and written judgments help to make explicit what parties can expect from each other in the future. Identity documents (birth certificates and other documents proving a person's status) are useful tools for relationships between people who do not know each other in person. Property rights can be registered, so that they are transparent to everyone. These instruments are part of a broader technology of making the essentials of future relationships transparent. Relationships can be more fruitful if the parties know each others' interests (needs, wishes and fears), exchange their expectations regarding the relationship, and have criteria for evaluating the relationship. They can also profit more from the relationship if their tasks and obligations are clear, they agree about allocation of possible gains and losses, and they have procedures to cope with differences.

In this paper, the point of departure is a dispute, where two parties experience a conflict of interests that they cannot easily resolve. The outcome, then, is a set of tasks and understandings for the future. Making the essence of the relationship explicit can also happen at the moment the parties enter into the relationship, or at a later time during the transaction. By doing this, the parties may be able to prevent conflict, or can manage it more easily, because their 'contract' limits the possible points of contention.

For stabilization to occur, the parties should also have sufficient reasons to live up to the outcomes that are agreed upon by the parties or imposed on them by the neutral. For the defendant in particular, compliance must be more attractive than non-compliance. The technology for enforcement is usually described in terms of monitoring performance and then by sanctions that are applied through reputation mechanisms (naming, shaming) or otherwise (fines, collective punishment like exclusion from future transactions). Nevertheless, the rewards from compliance in terms of future gains from relationships can be just as important. Table 7 suggests some ways to achieve compliance.

Tasks	Best Practices for Dispute Services/Transactions	Possible Providers of Services
5. Stabilize	<ul style="list-style-type: none"> - Standard negotiating, settlement, and decision documents (contracts/registrations) for most common disputes and issues; - Registrations, contracts, regulation (may be costly) - Informal compliance mechanisms (reputation, reciprocity, identification, authority) - Expected sanctions and rewards 	<ul style="list-style-type: none"> - Lawyers, mediators, notaries, other legal advisers - Community pressure - State agencies - Police - Bailiffs

Table 7 Best Practices for Facilitating Dispute System Task of Stabilizing and Service Providers (adapted from Barendrecht 2009)

2. Transaction Costs of Services that Stabilize Relationships

Creating stability can again be seen as a matter of transactions of the plaintiff and the defendant with people that help them to arrange it. Making the future relationship explicit can be done by a

transaction with a registrar, lawyer, mediator, notary, or court. Again, it requires the cooperation of the two parties to hire this type of help, so this may be a first source of transaction costs. As lawyers involved in writing contracts know, the process of making relationships explicit can easily lead to renewed conflict. Disputes may flare up again during this stabilization phase, so it can be necessary to have a neutral available again. Getting access to a neutral a second time does not create new transaction costs problems, so we do not have to repeat the analysis of Section D.

The second source of transaction costs should also be familiar at this point. Expert knowledge is required to make relationships transparent by registering property rights, writing contracts that settle a dispute, and formulating obligations for the future. Because of the public good character of this information, it may be that the market for assistance with writing judgments, (settlement) contracts and other ways to make expectations explicit does not reach the poor (see Sections B and C in relation to conflict management knowhow and objective criteria for settling distributive issues).

The transactions necessary for creating enforcement are rather complicated. If the parties have difficulties monitoring how the other party lives up to the arrangement, a person can be hired to oversee enforcement. Sometimes the monitoring task can be performed by a group of people in the community, or by a dedicated organization such as a consumer organization. The transaction costs of organizing these groups can be quite substantial, because many people have to be convinced to participate. Taking collective action can be difficult because of free rider problems.

In addition, it is usually not possible to buy all reasons for the defendant to live up to the agreement from one source. Such reasons can be provided by the plaintiff himself, who can withhold benefits from the settlement contract to the defendant, by members from the community, who can make the defendant suffer from a bad reputation, or by third parties who can apply sanctions. The literature on creating self-enforcing contracts and setting up private enforcement mechanisms is vast and gives a good impression of the transaction costs involved (MacLeod 2007; Chakravarty, MacLeod et al. 2008). Sanctions such as a fine or even exclusion from the community are costly to apply for those who have to administer it. Thus, a third party hired to perform the sanctioning task may try to renege on his obligation to apply the sanction. Trade organizations, for instance, will think twice before excluding one of their members, because of the additional conflict this may cause. A plaintiff will rely on the sanctioning system infrequently, so there are no repeated interactions between him and the ones imposing sanctions. Damage to reputation will only work if a number of people are interested hearing about the non-compliance and willing to withhold items from the defendant that are more important to him than the gains from non-compliance. Even consumer organizations are not always able to organize this. Complexity and connected transactions are thus also sources of transaction costs.

3. Consequences: Stabilization Difficult to Obtain for People with Limited Resources

Justice markets have to cope with these transaction costs. Making future relationships explicit through contracts or other documentation can be standardized. But it is difficult to find a business model for these transactions, because they involve transfer of information. So legal service providers revert to the usual approaches to selling expertise (individualization and packaging) and people with limited resources have little access to these services,

Providers of enforcement have to look for economies of scale in order to diminish transaction costs. They are likely to use a variety of strategies: influencing the reputation of the defendant, positive encouragement through the promise of future gains, and threats of imposing sanctions on the defendant. These services will not be easily accessible to the poor in their relations to the powerful and resource rich, because poor people will have more difficulties to find others who are both willing to support them and can exert influence over the defendant.

F. Complementarities

A dispute system is more than the sum of its parts. The five tasks a dispute system has to perform are linked. If one of the tasks is performed more efficiently, it often becomes easier to perform other tasks (Bendersky 2003). In this section, these linkages are analyzed as causes of extra transaction costs.

1. Connectedness between Dispute Services

Whether it is worthwhile to meet in order to resolve a dispute cooperatively, depends on the expectations of both parties concerning the next four steps in a dispute resolution process. For a plaintiff, it is much more attractive to start a process if he knows that he will be able to use low cost/high quality services that help him to communicate and negotiate, and to get a fair share in the distributive issues. If the negotiations fail, the plaintiff will also need a third party to decide. Finally, both a negotiated outcome and a decision by this third party should be enforceable.

Transaction cost economics identifies connectedness between different types of transactions as an important source of transaction costs (see Section IIB). Minimizing these costs is often the goal of governance structures such as alliances, networks of suppliers, and vertical integration in the supply chain (Dyer and Singh 1998).

Services that help people to negotiate disputes (mediation, negotiation services by lawyers or others, education in dispute resolution skills) also have complementarities with other elements of the dispute system. Negotiated outcomes are more likely to be complied with than imposed outcomes (research about mediated settlements reports compliance rates as high as 90%), because the parties “own” the outcome. Thus better communication and negotiation services make compliance services easier to deliver.

Publication of objective criteria for distributive issues is another service with complementarities. Objective criteria not only facilitate bargaining and reduce the probability of bargaining failure, but also enable clients to monitor whether their lawyers obtained good results for them in negotiations and whether neutrals make fair decisions. Buying corrupt judges, as well as less obvious ways to influence the outcome, will become more difficult and less effective. Such norms are also likely to make proceedings before a neutral adjudicator less complicated, because both the parties and the neutral can focus on the application of the criteria, which decreases litigation costs (Kaplow 1992). If social norms (objective criteria) about distributive issues are more transparent, non-compliance of outcomes based on these criteria is also more easily detectable. Reputation mechanisms and other informal sanctions are then easier to apply. Because of these complementarities, economists will predict that there less investment in the production of objective criteria than would be the case under perfect competition, the reason being that producers of objective criteria cannot profit from the gains that they cause on these adjacent markets.

There are also strong links between the negotiation process and adjudication (Bendersky 2003). Without the option of a low cost neutral intervention, negotiations will take longer and be more costly, with a higher risk of impasse. Judges are dependent on the parties for defining the issues and for giving them information and can go on where the parties got stuck in the negotiations. Information exchanged in the negotiation process is similar to what is needed in litigation, which can lead to important cost savings. If the quality of the litigation process is high, delivering procedural justice to clients, enforcement becomes easier (Tyler 2007; Hollander-Blumoff and Tyler 2008).

2. Integrated Services

These complementarities are well noted by the players on the market for justice. Commercial legal services providers often offer their clients more than one dispute resolution service. Integration of services into one firm is one possible answer to a problem of complementarities, because it ensures

that both the connected services are delivered, and that clients obtain access to the added value of the combination. Most lawyers offer packages of services. They assist their clients in negotiations, give them legal information, and help them with accessing the neutral. When it comes to a final outcome in litigation, a lawyer is also likely to help his client with enforcing the outcome.

Mediators also found out that integrated services are more profitable. Besides facilitating the negotiations between the clients with conflict management skills, many mediators also give their clients an evaluation of their legal positions (Wall, Stark et al. 2001). This evaluative mediation has effects very similar to a decision in summary proceedings by a common law court, or a decision in first instance in a civil law procedure. If one of the parties does not agree with the outcome imposed by this neutral, he can appeal at the next level of the court system.

Even judges have found it profitable to go beyond adjudication. Both arbiters and courts now routinely offer their clients some help with negotiating a settlement, and have also diversified the way of adjudication. US courts deliver more settlements than decisions, and more summary judgements than verdicts after a trial (Hadfield 2004). By referring parties to court-annexed mediation, they even offer higher value services in relation to the settlement task. In some countries, adjudicators are also involved in enforcement of judgments (Kennett 2000; Henderson, Shah et al. 2004). In addition, courts have always been providers of objective criteria through their case law, albeit in a limited way.

For clients, integration is not always beneficial. If lawyers give advice regarding settlement processes and ways to distribute value, this may be influenced by their personal interest to sell additional services as a litigator. There are doubts whether it is desirable that mediators, who facilitate integrative negotiations, should also advise about suitable solutions on distributive issues (evaluative mediation).

The integration has not yet been complete, however. The market does not provide integrated dispute resolution services from letting parties meet, facilitating their negotiations, providing objective criteria, to deciding distributive issues and organizing compliance for them. Whether such integrated services are possible at all, remains to be seen (see Barendrecht 2009 for a description of a possible model).

V. Conclusions

So, what have we learned about the capabilities of markets to deliver justice?

This paper analyzed how plaintiffs can be served on five markets that satisfy their demand for justice. A plaintiff may need (1) help with creating incentives for the defendant to meet and solve a conflict cooperatively, (2) assistance with integrative negotiations, (3) objective criteria for distributive issues, (4) low cost access to a neutral decision, and (5) help with stabilization of the relationship by making expectations explicit and by providing incentives on the defendant to live up to outcomes. A preliminary analysis of these five markets shows that each has its own sources of transaction costs. These transaction costs explain many characteristics of the market for justice. Table 8 summarizes the results.

One conclusion from the analysis is that markets contribute more to solving disputes than we usually assume. Most disputes are managed without government intervention. The market can provide incentives on defendants to cooperate, negotiation assistance and norms that help to settle distributive issues. It can also provide neutrals, help people to make relationships explicit, and do much to organize enforcement. There is no single element of a dispute system that cannot be provided by the market.

Tasks	Basic technology	Sources of Transaction Costs	Market reactions
1. Meet	Make costs and benefits of participation for defendant higher than costs and benefits of fighting, or avoiding	1. Difficulties of concluding ex post dispute resolution agreements: - Psychological barriers - Strategic barriers 2. Cooperation between many people needed to organize sufficient incentives on powerful defendants to cooperate	1. Little demand for mediation, arbitration, and other tailor made neutral dispute services 2. Unilateral advice where neutral services would be more efficient 3. Demand for patronage (help from people who can influence the defendant) 4. Demand for checks and balances
2. Talk	Support integrative negotiation (interest based)	Information about negotiation and conflict management is public good	1. Insufficient supply 2. Business models for delivering expertise: - individualized advice - coaching client through process - taking over process from client - packaging information 3. Problems with access for clients with limited resources
3. Share	Supply information about fair shares (sharing rules, objective criteria)	1. Information about fair solutions is public good 2. Providers of fairness information face pressure/criticism from all sides	1. Insufficient supply 2. Business models for delivering expertise (see above) 3. Problems with access for clients with limited resources
4. Decide	Make option of a neutral decision available (at low cost)	1. Difficulties of concluding ex post dispute resolution agreements: - Psychological barriers - Strategic barriers 2. Insufficient incentives on neutral to provide efficient processes and fair solutions because of: - dependence on neutral - low frequency of transactions - uncertainty and complexity - monitoring difficulties.	1. Access to neutrals on markets is unavailable or unreliable 2. States provide neutrals (effectiveness doubtful)
5. Stabilize	Supply tools to make arrangements explicit; Make costs and benefits of compliance higher than those of non-compliance	Information about contracting and making relationships transparent is public good Cooperation between many people needed to organize sufficient incentives on powerful defendants to cooperate	1. Insufficient supply 2. Business models for delivering expertise 3. Lack of enforcement, in particular against powerful defendants
Supply Chain Approach	Strengthen links between tasks	Complementarities/connectedness between the five types of services	Integrated business models for providing unilateral legal services, mediation and adjudication

Table 8: Sources of Transaction Costs on Markets for Justice and Ways Markets Cope with Them

It would be wrong, however, to conclude that markets can be left on their own to dispense justice. On the contrary, we encountered three major reasons why demand and supply for justice services do not meet in such a way that justice is universally accessible.

First, buying justice services is difficult because two opponents are unlikely to agree on the kind of service they need. Disputants may experience psychological barriers that make it difficult to enter a cooperative procedure, and often also have strategic reasons for not agreeing on a procedure. These coordination problems persist during the dispute resolution process. When courts or other neutrals decide disputes, they thus experience insufficient incentives from their clients to supply high quality and low cost procedures.

A second source of high transaction costs relates to dispute services that consist of providing expertise. Such information tends to be difficult to sell for a profit. It has a public good character, is an experience good, and the costs of production can be rather high compared. As a consequence, conflict management skills (integrative negotiation know how), objective criteria for settling

distributive issues, and relationship formats (contracts) are delivered through business models that do not always reach the persons that need them most: those with limited resources.

Third, justice transactions tend to have a higher value if other justice transactions are also available. Negotiation assistance and neutral decision making by courts, for instance, work better if objective criteria for settling distributive issues are available. The incentives for defendants to solve conflicts cooperatively and to live up to outcomes typically come from the joint effects of monitoring, the value of reputation, the threat of informal sanctions, internal motivation, and formal enforcement. Many people have to cooperate to make this happen. These complementarities, network-effects, or connected transactions require an integrated approach.

There is much room for improvement of this analysis. Other break-downs in constituent parts may reflect the realities on justice markets in a better way. Our analysis departed from a conflict as the trigger to address justice services, and assumed that actions taken by plaintiffs seeking help in conflicts gradually create a legal system in a bottom-up manner. We only touched briefly how group interests and group processes are used to obtain access to justice. The demand for protection of interests and rights that may exist before a conflict materializes deserves further study as well. Finally, we concentrated on access to justice for plaintiffs, who want to achieve a change in the status quo, and not on the position of defendants. Taking other points of departure may disclose other types of essential services, other sources of transaction costs, and other ways to minimize them.

But we were able to explain many characteristics of the market for justice. Legal services tend to be individualized, because this is the business model that can cope with the public good character of information. There is little commoditization. Thus, information about conflict management and about fair outcomes is difficult to access for defendants with limited resources. Justice also tends to be a luxury good because many people need to cooperate in order to reign in powerful defendants. Unilateral advice is much more common than jointly addressing a mediator or adjudicator, although that is generally an efficient way to solve a dispute.

In this paper, we did not discuss the policy implications. These also depends on the likely transaction costs of government interventions. For the time being, our analysis suggests that governments should focus on ways to diminish the three major sources of transaction costs we discussed. They should help parties agree on an efficient procedure and coordinate their transactions with third parties; ensure that the going rates of justice and conflict management know how are available that markets fail to provide; and facilitate coordination between the many transactions that make justice happen in the real world.

For instance in the life of a woman in Ndirande, who needs a place where she can safely discuss with the family of her deceased husband what should happen to the house and their other assets. She needs innovative services that bring essential information to her: guidance how to conduct these discussions and criteria for settling the issues in a fair manner. These services would not be free, but hopefully they would be affordable for her. She needs some assistance to form a network of relationships that ensures cooperation from the family of her man. She needs tools to ensure the shadow of a neutral decision by someone she can trust.

Justice will emerge spontaneously because people demand it. But some thoughtful policies that decrease the costs of shopping for justice may help.

Literature

- Akerlof, G. A. (1970). "The market for" lemons": quality uncertainty and the market mechanism." The quarterly journal of economics: 488-500.
- Allred, K. G. (2005). Relationship Dynamics in Disputes: Replacing Contention with Cooperation. Handbook of Dispute Resolution. M. L. Moffitt and R. C. Bordone. New York, Jossey-Bass: 83-98.
- Anderson, M. R. (2003). Access to justice and legal process: making legal institutions responsive to poor people in LDCs, Institute of Development Studies at the University of Sussex.
- Arrow, K. J. (1995). Barriers to Conflict Resolution, WW Norton & Company.
- Baarsma, B., F. A. Felsö, et al. (2008). Regulation of the legal profession and access to law, Report commissioned by the International Association of Legal Expenses Insurance (RIAD), SEO Economic Research.
- Barendrecht, M. (2008). In Search of Microjustice: Five Basic Elements of a Dispute System. SSRN.
- Barendrecht, M. (2009). "Best Practices for an Affordable and Sustainable Dispute System: A Toolbox for Microjustice." SSRN.
- Barendrecht, M. and B. R. De Vries (2006). "Fitting the Forum to the Fuss with Sticky Defaults: Failure on the Market for Dispute Resolution Services? ." Cardozo Journal of Conflict Resolution 7(1).
- Barendrecht, M., P. Kamminga, et al. (2008). Priorities for the Justice System: Responding to the Most Urgent Legal Problems of Individuals, SSRN.
- Barendrecht, M. and P. Van Nispen (2008). Microjustice, SSRN.
- Barendrecht, M. and J. H. Verdonschot (2008). Objective Criteria: Facilitating Dispute Resolution by Information About Going Rates of Justice, SSRN.
- Bendersky, C. (2003). "Organizational dispute resolution systems: A complementarities model." The Academy of Management Review: 643-656.
- Bingham, L. B. (2008). "Designing Justice: Legal Institutions and Other Systems for Managing Conflict." Ohio St. J. on Disp. Resolution.
- Bone, R. G. (2008). "Making Effective Rules: The Need for Procedure Theory." Oklahoma Law Review 61.
- Bordone, R. C. (2008). Dispute System Design: An Introduction.
- Botero, J. C., R. La Porta, et al. (2003). The World Bank Research Observer 18(1): 61-88.
- Braun, P., J. Brzostowski, et al. (2006). "e-Negotiation systems and software agents: methods, models, and applications." Intelligent Decision-Making Support Systems: Foundation, Applications, and Challenges. Springer Verlag.
- Brett, J. M., M. Olekalns, et al. (2007). "Sticks and Stones: Language, Face, and Online Dispute Resolution." The Academy of Management Journal (AMJ) 50(1): 85-99.
- Buck, A., P. Pleasence, et al. (2008). "Do Citizens Know How to Deal with Legal Issues? Some Empirical Insights." Journal of Social Policy 37(04): 661-681.
- Buscaglia, E. and P. B. Stephan (2005). "An empirical assessment of the impact of formal versus informal dispute resolution on poverty: A governance-based approach." International Review of Law and Economics 25(1): 89-106.
- Cabrillo, F. and S. Fitzpatrick (2008). The Economics of Courts and Litigation. Cheltenham, UK, Edward Elgar.
- Cappeletti, M. and B. Garth (1978). "Access to Justice: The Newest Wave in the Worldwide Movement to Make Rights Effective." Buffalo Law Review 27(181).
- Carothers, T., Ed. (2006). Promoting the Rule of Law Abroad: In Search of Knowledge. Washington D.C., Carnegie Endowment for International Peace.
- Carraro, C., C. Marchiori, et al. (2006). "Advances in Negotiation Theory: Bargaining, Coalitions and Fairness." World.
- Chakravarty, S., W. B. MacLeod, et al. (2008). "Contracting in the Shadow of the Law." NBER Working Paper.
- Cialdini, R. B. (2007). "Descriptive Social Norms As Underappreciated Sources Of Social Control." Psychometrika Vol. 72(No. 2): 6.
- Commission on Legal Empowerment of the Poor (2008). Making the Law Work for Everyone. I.
- Commission on Legal Empowerment of the Poor (2008). Making the Law Work for Everyone. II Working Group Reports.
- Cooter, R., S. Marks, et al. (1982). "Bargaining in the Shadow of the Law: A Testable Model of Strategic Behavior " The Journal of Legal Studies 11(2): 225-251

- Costantino, C. A. and C. Sickles Merchant (1996). Designing conflict management systems. San Francisco, Jossey-Bass.
- Currie, J. and W. B. MacLeod (2008). "First Do No Harm? Tort Reform and Birth Outcomes*." Quarterly Journal of Economics 123(2): 795-830.
- Daughety, A. F. and J. F. Reinganum (2008). Settlement. Discussion Paper prepared for inclusion in the Encyclopedia of Law and Economics (2nd Ed.), Vol. 10: Procedural Law and Economics, Ed. by Chris William Sanchirico to be published by Edward Elgar.
- David, R. J. and S. K. Han (2004). "A systematic assessment of the empirical support for transaction cost economics." Strategic Management Journal 25(1).
- Dawson, R. (2005). Developing knowledge-based client relationships: leadership in professional services, Butterworth-Heinemann.
- De Soto, H. (2000). The Mystery of Capital: Why Capitalism Triumphs in the West and Fails Everywhere Else. New York.
- Deutsch, M., P. T. Coleman, et al. (2006). The Handbook of Conflict Resolution: Theory and Practice. San Francisco.
- Dixit, A. (2009). "Governance Institutions and Economic Activity." American Economic Review 99(1): 5-24.
- Dixit, A. K. (2004). Lawlessness and Economics: Alternative Modes of Governance, Princeton University Press.
- Djankov, S., R. La Porta, et al. (2003). "Courts." Quarterly Journal of Economics(May).
- Dyer, J. H. and H. Singh (1998). "The relational view: Cooperative strategy and sources of interorganizational competitive advantage." Academy of management review: 660-679.
- Eisenberg, T. and G. P. Miller (2006). The Flight from Arbitration: An Empirical Study of Ex Ante Arbitration Clauses in Publicly-Held Companies' Contracts, SSRN.
- Fisher, R., W. Ury, et al. (1991). Getting to yes: negotiating agreement without giving in. New York, N.Y., Penguin Books.
- French, J. R. P. and B. Raven (2001). The bases of social power. The Negotiation Sourcebook. I. G. Asherman and S. V. Asherman. Amherst, Mass., HRD Press: 61-82.
- Frynas, J. G. (2001). "Problems of access to courts in Nigeria: Results of a survey of legal practitioners." Social & Legal Studies 10(3): 397-419.
- Gennaioli, N. and A. Shleifer (2007). "The evolution of common law." Journal of Political Economy 115(1): 43-68.
- Golub, S. (2003). Beyond Rule of Law Orthodoxy: The Legal Empowerment Alternative, Carnegie Endowment for International Peace.
- Gramatikov, M. (2008). A Framework for Measuring the Costs of Paths to Justice, SSRN.
- Gramatikov, M. (2008). Multiple Justiciable Events in Bulgaria. Reaching Further: New Approaches to the Delivery of Legal Services. L. S. R. Centre. London: 22.
- Greif, A. (2006). Institutions and the path to the modern economy: Lessons from medieval trade, Cambridge University Press.
- Hacker, D. (2008). "A legal field in action: the case of divorce arrangements in Israel." International Journal of Law in Context 4(01): 1-33.
- Hadfield, G. (2008). "Legal Barriers to Innovation." Regulation 31(3): 14-21.
- Hadfield, G. and E. Talley (2006). "On Public versus Private Provision of Corporate Law." JOURNAL OF LAW ECONOMICS AND ORGANIZATION 22(2): 414.
- Hadfield, G. K. (2000). "The Price of Law: How the Market for Lawyers Distorts the Justice System." Michigan Law Review 98(4): 953-1006.
- Hadfield, G. K. (2004). "Delivering Legality on the Internet: Developing Principles for the Private Provision of Commercial Law." Am Law Econ Rev 6(1): 154-184.
- Hadfield, G. K. (2004). "Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases." Journal of Empirical Legal Studies 1(3): 705-734.
- Hammergren, L. A. (2007). Envisioning Reform: Improving Judicial Performance in Latin America, Pennsylvania State University Press.
- Henderson, K., A. Shah, et al. (2004). "Regional Best Practices: Enforcement of Judgments: Lessons from Latin America." IFES, Rule of Law Paper Series, WashingtonDC.
- Hensler, D. R. (2002). "Suppose It's Not True: Challenging Mediation Ideology." Journal of Dispute Resolution.

- Hollander-Blumoff, R. and T. R. Tyler (2008). "Procedural Justice in Negotiation: Procedural Fairness, Outcome Acceptance, and Integrative Potential." Law & Social Inquiry 33(2): 473-500.
- Huang, K.-C. (2007). Does Discovery Promote Settlement? - An Empirical Answer. 2007 Conference on Empirical Legal Studies.
- Husted, B. W. and R. Folger (2004). "Fairness and Transaction Costs: The Contribution of Organizational Justice Theory to an Integrative Model of Economic Organization." ORGANIZATION SCIENCE 15(6): 719-729.
- Jensen, E. G. (2002). The Rule of Law and Judicial Reform: The Political Economy of Diverse Institutional Patterns and Reformers' Responses. Beyond Common Knowledge: Empirical Approaches to the Rule of Law. E. G. Jensen and T. C. Heller, Stanford University Press.
- Kaplow, L. (1992). "Rules versus standards: an economic analysis." Duke Law Journal: 557-629.
- Katsh, E. E., M. E. Katsh, et al. (2001). Online Dispute Resolution: Resolving Conflicts in Cyberspace. New York, John Wiley & Sons, Inc. .
- Kennett, W. A. (2000). Enforcement of judgments in Europe, Oxford University Press.
- Kim, J. and J. T. Mahoney (2005). "Property rights theory, transaction costs theory, and agency theory: an organizational economics approach to strategic management." Managerial and Decision Economics 26(4): 223-42.
- Klement, A. and Z. Neeman (2009). Civil Justice Reform: A Mechanism Design Framework, SSRN.
- Korobkin, R. B. and J. W. Doherty (2007). Who Wins in Settlement Negotiations?, SSRN.
- Lande, J. (2005). "The Promise and Perils of Collaborative Law." Dispute Resolution Magazine 12.
- Lande, J. (2008). "Developing Better Lawyers and Lawyering Practices: Introduction to the Symposium on Innovative Models of Lawyering." Journal of Dispute Resolution(1).
- Lempert, R. (1978). "More tales of two courts: Exploring changes in the dispute settlement function of trial courts." Law & Society Review 13: 91.
- Lewicki, R. J., D. M. Saunders, et al. (2006). Negotiation Boston, McGraw Hill/Irwin.
- Libecap, G. D. (1989). Contracting for Property Rights, Cambridge University Press.
- López de Silanes, F. (2002). "The politics of legal reform." Economía: 91-136.
- Macher, J. T. and B. D. Richman (2008). "Transaction cost economics: An assessment of empirical research in the social sciences." Business and Politics 10(1): 1-63.
- MacLeod, W. B. (2007). "Reputations, Relationships, and Contract Enforcement." Journal of Economic Literature 45(3): 595-628.
- Messick, R. (1999). Reducing Court Delays: Five lessons from the United States. PREM notes, The World Bank.
- Milgrom, P. R. and J. Roberts (1992). Economics, organization and management, Prentice-Hall Englewood Cliffs, NJ.
- Mnookin, R. H. and L. Kornhauser (1978). "Bargaining in the Shadow of the Law: The Case of Divorce." Yale Law Journal 88: 950.
- Mnookin, R. H., S. R. Peppet, et al. (2000). Beyond Winning. Negotiating Deals To Create Value In Deals And Disputes. Cambridge Mass., The Belknap Press of Harvard University Press.
- Mnookin, R. H., L. Susskind, et al. (1999). Negotiating on Behalf of Others, Sage Publications.
- Moffitt, M. L., R. C. Bordone, et al. (2005). The Handbook of Dispute Resolution, Jossey-Bass.
- Moore, C., W. (2003). The mediation process—Practical strategies for resolving conflict, . San Francisco, Jossey-Bass.
- Mulherin, J. H., J. M. Netter, et al. (1991). "Prices Are Property: The Organization of Financial Exchanges from a Transaction Cost Perspective." Journal of Law and Economics: 591-644.
- Muthoo, A. (1999). Bargaining Theory with Applications. Cambridge U.K., Cambridge University Press.
- Muthoo, A. (2000). "A Non-Technical Introduction to Bargaining Theory." World Economics 1(2): 145-166.
- Nisenbaum, S. (2009). Negotiation and the Shadow of Law. Handbook on Building Cultures of Peace. J. De Rivera: 245-257.
- Oetzel, J. G. and S. Ting-Toomey (2006). The SAGE handbook of conflict communication. Thousand Oaks, SAGE.
- Parisi, F. (2000). 9500 Spontaneous Emergence of Law: Customary Law. Encyclopedia of Law and Economics. B. Bouckaert and G. De Geest. Cheltenham, Edward Elgar. V The Economics of Crime and Litigation.
- Parker, C. (1999). Just lawyers, Oxford University Press.
- Pillutla, M. M. and J. K. Murnighan (2003). "Fairness in Bargaining." Social Justice Research,: 22.

- Pinkley, R. L., M. A. Neale, et al. (1994). "The impact of alternatives to settlement in dyadic negotiation." Organizational Behavior and Human Decision Processes 57: 97-116.
- Ponzetto, G. A. M. and P. A. Fernandez (2008). "Case law versus statute law: an evolutionary comparison." The Journal of Legal Studies 37(2): 379-430.
- Posner, R. A. (1993). "What Do Judges and Justices Maximize? (The Same Thing Everybody Else Does)." Supreme Court Economic Review: 1-41.
- Posner, R. A. and E. B. Rasmusen (1999). "Creating and Enforcing Norms, with Special Reference to Sanctions." International Review of Law and Economics 19: 14.
- Raban, D. R. (2007). "User-centered evaluation of information: a research challenge." Internet Research 17(3): 306-322.
- Rao, P. K. (2003). The Economics of Transaction Costs: Theory, Methods, and Applications. New York, Palgrave MacMillan.
- Rapaczynski, A. (1996). "The Roles of the State and the Market in Establishing Property Rights." The Journal of Economic Perspectives: 87-103.
- Ray, B. (2009). Extending the Shadow of the Law: Using Hybrid Mechanisms to Develop Constitutional Norms in Socioeconomic Rights Cases: 2.
- Relis, T. (2002). "Civil Litigation from Litigants' Perspectives: What We Know and What We Don't Know About the Litigation Experience of Individual Litigants." Studies in Law, Politics and Society 25: 151-212.
- Rhode, D. L. (2004). Access to Justice. New York, Oxford University Press.
- Robson, A. and S. Skaperdas (2008). "Costly enforcement of property rights and the Coase theorem." Economic Theory 36(1): 109-128.
- Ross, L. (1995). Reactive Devaluation in Negotiation and Conflict Resolution. New York, W.W. Norton. .
- Schneider, M. R. (2005). "Judicial Career Incentives and Court Performance: An Empirical Study of the German Labour Courts of Appeal." European Journal of Law and Economics 20(2): 127-144.
- Shapiro, C. and H. R. Varian (1998). "Versioning: The smart way to sell information." Harvard Business Review: 107.
- Shariff, K. Z. (2003). "Designing Institutions to Manage Conflict: Principles for the Problem Solving Organization." Harvard Negotiation Law Review.
- Shavell, S. (1995). "Alternative dispute resolution: An economic analysis." The Journal of Legal Studies: 1-28.
- Shavell, S. (2004). Foundations of Economic Analysis of Law. Cambridge, Mass., Harvard University Press.
- Shell, R. (2006). Bargaining for Advantage: Negotiation Strategies for Rational People. London, Penguin Books.
- Stephen, F. and J. Love (1999). Regulation of law firms. Encyclopedia of Law and Economics. G. De Geest and B. Bouckaert. London, Edgar Elgar: 987-1017.
- Stephen, F. H. (2006). An Economic Perspective on the Regulation of Legal Service Markets.
- Sternlight, J. R. (2007). "In Defense of Mandatory Arbitration (If Imposed on the Company)." Nevada Law Journal 8.
- Stiglitz, J. (2000). Handbook of Economics of the Public Sector.
- Stiglitz, J. E. (1999). "Knowledge as a global public good." Global public goods 1(9): 308-326.
- Stipanowich, T. J. (2004). "ADR and the "Vanishing Trial": the growth and impact of "Alternative Dispute Resolution"." Journal of Empirical Legal Studies 1(3): 843-912.
- Susskind, R. (2008). The End of Lawyers? Rethinking the Nature of Legal Services. Oxford, Oxford University Press.
- Tullock, G. (1980). Trials on Trial: The Pure Theory of Legal Procedure. New York, Columbia University Press.
- Tyler, T. R. (1997). Citizen Discontent with Legal Procedures: A Social Science Perspective on Civil Procedure Reform. Civil Procedure Reform in Comparative Context, Florence, Italy, New York University.
- Tyler, T. R. (2007). Psychology and the Design of Legal Institutions. Nijmegen, Wolf Legal Publishers.
- Ury, W. (1991). Getting past no: negotiating with difficult people. New York, Bantam Books.
- Ury, W. L., J. M. Brett, et al. (1988). Getting disputes resolved: Designing systems to cut the costs of conflict. San Francisco, Jossey Bass.

- Van Kleef, G. A., C. K. W. De Dreu, et al. (2006). "Supplication and Appeasement in Conflict and Negotiation: The Interpersonal Effects of Disappointment, Worry, Guilt, and Regret." Journal of Personality and Social Psychology 91: 124-142.
- Van Velthoven, B. J. and M. Ter Voert (2004). Geschildbeslechtingsdelta 2003. Den Haag, WODC.
- Varian, H. R. (1998). Markets for information goods.
- Velikonja, U. (2009). "Making Peace and Making Money: Economic Analysis of the Market for Mediators in Private Practice." Albany Law Review 72.
- Verdonschot, J. H. (2009). Delivering Objective Criteria: Sources of Law and the Relative Value of Neutral Information for Dispute Resolution, SSRN.
- Vossen, M. and M. Knapen (2009). Township Blues: Legal needs of individuals in Ndirande, Blantyre. Tilburg, Wereld Podium/Panga Press.
- Wall, J. A., Jr., J. B. Stark, et al. (2001). "Mediation: A Current Review and Theory Development." Journal Of Conflict Resolution 45(3): 370-391.
- Walton, R. and R. McKersie (1965). A Behavioral Theory of Labor Negotiations. Beverly Hills, Sage Publications.
- Williamson, O. E. (1981). "The Economics of Organization: The Transaction Cost Approach." American Journal of Sociology 87(3): 548.
- Williamson, O. E. (1999). "Public and private bureaucracies: a transaction cost economics perspectives." J Law Econ Organ 15(1): 306-342.
- Wissler, R. L. (2004). "The effectiveness of court-connected dispute resolution in civil cases." Conflict Resolution Quarterly 22(1-2): 55-88.
- Wojkowska, E. (2006). Doing Justice: How informal justice systems can contribute. United Nations Development Programme, Oslo Governance Centre, The Democratic Governance Fellowship Programme.
- Yeazell, S. (2008). Transparency for Civil Settlements: NASDAQ for Lawsuits?, SSRN.
- Zuckerman, A. A. S., S. Chiarloni, et al. (1999). Civil justice in crisis: comparative perspectives of civil procedure, Oxford University Press.